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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: **Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain In-Shell Raw Pistachios from Iran**

Summary

We have analyzed the comments and rebuttal comments from interested parties in the administrative review of the antidumping duty order on certain in-shell raw pistachios (pistachios) from Iran (A-507-502). As a result of our analysis of information and arguments on the record, including factual information obtained since the preliminary results, we have determined that the respondent in the above-captioned proceeding, Tehran Negah Nima Trading Company, Inc., trading as Nima Trading Company, Inc. (Nima), made sales to the United States at less than normal value (NV) during the period of review (POR). We recommend that you approve the positions developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from interested parties:

Comment 1: Razi Domghan Agricultural and Animal Husbandry Company's Knowledge of the U.S. Sale of Pistachios
Comment 2: Application of Combination Rate for Nima's U.S. Sales of Pistachios Produced by Razi Domghan Agricultural and Animal Husbandry Company
Comment 3: *Bona Fides* of Tehran Negah Nima Trading Company, Inc.'s U.S. Sale
Comment 4: Calculation and Application of Constructed Value Profit
Comment 5: Application of Total Adverse Facts Available
Comment 6: Ministerial Error Allegations Relating to the Calculation of Nima's Indirect Selling and Credit Expenses, and Foreign Unit Price in U.S. Dollars

Discussion of the Issues

Comment 1: Razi Domghan Agricultural and Animal Husbandry Company's (Razi's) Knowledge of U.S. Sale of Pistachios

The California Pistachio Commission (petitioner) argues that the instant review should be rescinded because the Department should find that Razi had knowledge of the U.S. sale and, thus, Nima had no reviewable U.S. sales. Based on the record as a whole, including information provided by petitioner in its May 18, 2004, filing, petitioner argues that Razi knew or should have known at the time of its sale to Nima that its pistachios were destined for export to the United States.

Petitioner claims that, despite introducing the four factors the Department normally considers in evaluating the question of knowledge with qualifying language inferring that the factors are not exhaustive, it is clear from its conclusion that the Department considered only those factors and no others in its knowledge analysis. As such, petitioner argues that the Department has created a "new" knowledge test inconsistent with the Department's established practice and contrary to U.S. law.

Petitioner contends that the closed-ended "test" used in the *Preliminary Results* contradicts the Department's previous determinations, including one of the cases cited in the *Preliminary Results* as purported authority for the test. Citing *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Order in Part*, 64 FR 69694 (December 14, 1999) (*DRAMs*), petitioner claims that the Department found, in that case, the requisite level of knowledge even though none of four factors identified in the *Preliminary Results* was present. In particular, petitioner states that the Department considered whether the sales made by LG Semicon Co., Ltd. (LG), respondent in the *DRAMs* case, were U.S. sales, and therefore subject to review, on the grounds that LG knew or should have known that the merchandise was destined to the United States. Petitioner asserts that the Department concluded that LG knew or should have known that the merchandise was destined for the United States, based on factors not considered by the Department in the instant case, including: 1) statements by two former LG employees alleging that LG knew the merchandise sent to Europe was ultimately destined for the United States; and 2) certain proof of "delivery" documents used by LG's Mexican customer to ship the merchandise to the United States. Petitioner claims that while LG submitted declarations by two of its own officials, denying that LG had knowledge of the ultimate destination of the merchandise, nonetheless, the Department determined that LG knew or should have known that the merchandise was destined for the United States, "based on the nature and characteristics of these transactions." *See DRAMs* at 69713. According to petitioner, the Department's decision in *DRAMs* gives no indication that any of the factors set forth in the Department's newly articulated test were met.

Petitioner contends that the Department's preliminary determination that Razi neither knew nor should have known that the pistachios it sold to Nima were destined for the United States is contradicted by substantial evidence on the record and constitutes a violation of the Department's obligation in making factual determinations. *See* 19 USC § 1516a(b)(1)(B); *see e.g.*, *LG Semicon Co., Ltd. v. United States*, 23 CIT 1074 at 1078-79 (1999); *Yue Pak, Ltd. v. United States*, 20 CIT 495 (1996), *aff'd*, 111 F.3d 142 (Fed. Cir. 1997). In applying the Department's "knew or should have known" standard, petitioner states that the courts "review the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the {supporting} evidence.'" *See Nippon Steel v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003), citing *Atlantic Sugar, Ltd. v. United States*, 733 F.2d 1556, 1562 (Fed. Cir. 1984).

By contrast, petitioner argues that under the four-pronged test applied in the *Preliminary Results*, the Department will not find the requisite level of knowledge unless one of the elements of the Department's newly articulated test is met. *See Preliminary Results* at 48199. Petitioner further argues that such a test categorically excludes certain types of evidence which may not only "fairly detract from," but may be more important than the four narrow types of evidence allowed under the test. Petitioner presents several scenarios in order to illustrate the "absurdity" of the Department's new four-pronged knowledge test. *See* petitioner's September 16, 2004, case brief (petitioner's case brief), at 10-11. Petitioner insists that under the new test, as applied in the *Preliminary Results*, the Department cannot conclude that the producer had knowledge of the ultimate destination as long as the producer: 1) did not prepare or sign any documents, packaging or labeling indicating a U.S. destination; 2) did not produce merchandise with unique features or specifications that would tie the sale to the United States; and 3) did not admit that it had knowledge at the time of sale. Such outcomes, petitioner claims cannot be reconciled with the substantial evidence standard of section 516A of the Tariff Act of 1930, as amended (the Act), which applies to all of the Department's factual determinations in administrative reviews.

Petitioner argues that a consideration by the Department of all relevant evidence on the record points to one conclusion: that Razi knew or should have known at the time of sale that its pistachios were destined for export to the United States. In particular, citing Nima's supplemental section A and C questionnaire response, dated December 4, 2003 (Nima's SQR), which told of a pre-sale visit with Razi's owner, petitioner contends that the tales told by Nima and Razi are inconsistent and unreliable. Petitioner asserts that after reviewing its comments to Nima's SQR, Nima backpedaled in its second supplemental questionnaire response with respect to the knowledge issue. *See* Nima's second supplemental sections A and C questionnaire response, dated February 6, 2004 (Nima's SSQR), at 5-6.

Moreover, petitioner contends that, with Razi's help, Nima's attempt at obfuscation continued even during verification. Petitioner claims that Razi's statements at verification are directly at odds with the story told by Nima earlier in the course of the instant review. Petitioner notes that Razi's owner, Mr. Avazabadian, "denied that he had any knowledge that the pistachios he sold to Nima were

destined for the United States until May 2004," but argues that Mr. Avazabadian's statements are not plausible because by his own account his trust in Nima developed slowly over time. Petitioner notes that it was not until May 2004 that Mr. Avazabadian was even willing to provide Nima with his ledger documents. *See* Memorandum to the File through Abdelali Elouaradia, Program Manager, Office 6, Administrative Review of the Antidumping Duty Order on Certain In-Shell Raw Pistachios from Iran: Verification of U.S. Sales Questionnaire Responses Submitted by Tehran Negah Nima Trading Company, Ltd. (Nima), dated June 29, 2004 (Sales Verification Report), at 4. Yet, petitioner contends that we are expected to believe that several months before, in December 2003, in certifying to the accuracy of information submitted to the Department, Mr. Avazabadian, at Nima's request, was willing to sign a legal document that he did not understand and which he knew would be submitted to another country. Petitioner notes that Mr. Valibeigi (Razi's representative in the current proceeding), included in Razi's March 1, 2004, first supplemental questionnaire response statements noting that Mr. Avazabadian and his sister received an unsolicited newsletter from the Western Pistachios Association (WPA) in January 2004, which included information concerning Razi's role in this proceeding. However, petitioner notes that Mr. Avazabadian insisted at verification that he did not become aware of the ultimate destination of the pistachios until May 2004. Based on all of the above, petitioner argues that the various stories told by Nima and Razi during the course of this proceeding cannot be reconciled, and thus, are not reliable.

With respect to comments submitted by Nima in response to the Department's request for any additional documentary evidence, petitioner argues that Nima's statements are unsupported, and therefore, should be given no weight by the Department in its final results. Petitioner asserts that supplemental statements by Nima's representative add nothing of relevance to the factual record as they provide no further indication of the date on which Nima's employees, shareholders, and board were allegedly instructed to withhold information regarding the company's intention to export pistachios to the United States. Moreover, if Nima truly appreciated the significance of maintaining a policy by which its personnel, shareholders, and board would not reveal the ultimate destination of the shipment under review to any of its suppliers, including Razi, petitioner questions why Nima did not explain this policy to the Department earlier in the course of this proceeding. Petitioner concludes that Nima's supplemental statements are unsupported by documentation or even a certification of accuracy and completeness from Nima itself, and thus, do not suffice as evidence.

Petitioner argues that the Department failed to give proper weight to the Declaration of Robert I. Schramm, submitted on behalf of petitioner on May 18, 2004 (Schramm Declaration), in evaluating Razi's knowledge of the ultimate destination of the subject merchandise in its *Preliminary Results.* Petitioner claims that the Schramm Declaration cannot be discounted as inadmissible hearsay because (a) the Department, which is not subject to the Federal Rules of Evidence, routinely relies on hearsay; and (b) even under the Federal Rules of Evidence, the Schramm Declaration either would not constitute hearsay or would be subject to at least one of the exceptions to rules against hearsay.

Because virtually all of the information upon which the Department relies in antidumping administrative reviews is unsworn and unauthenticated and the Department's procedures do not allow for cross-examination of witnesses by adverse parties, petitioner asserts that the Department routinely relies on hearsay. Citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review of the Order on Bars and Wedges*, 68 FR 53347 (September 10, 2003) and accompanying Issues and Decision Memorandum at Comment 10, petitioner claims that a respondent in that case relied on hearsay statements from unrelated importers in determining certain dates of sale for subject merchandise. Petitioner states that the Department, notwithstanding objections made by the petitioner in that case, did not seek to obtain the information directly from the importers or from the U.S. Customs and Border Protection (CBP), but instead accepted the hearsay evidence tendered by the respondent as a sufficiently reliable basis for determining the dates of sales.

According to petitioner, in the absence of a statute, regulation, or practice prohibiting the use of hearsay, the Department's refusal to consider the Schramm Declaration on grounds that it is alleged to be hearsay is not in accordance with the law. Under Rule 805 (Hearsay within Hearsay), petitioner asserts that the statements of the source which are reported in the Schramm Declaration "are not excluded by the hearsay rule, even though the declarant {here, petitioner's source} is available as a witness." *See* Federal Rules of Evidence 803(6). In addition, petitioner asserts that even if the statements by its source to Mr. Schramm were otherwise to be regarded as inadmissible hearsay, such statements would be subject to the "residual exception" under Rule 807. In summary, petitioner contends that under the circumstances of this proceeding, statements of petitioner's source satisfy all relevant criteria of the hearsay exceptions in Rules 803(6) and 807, and, therefore, may not be dismissed as inadmissible hearsay.

With respect to the statements made by Mr. Avazabadian to petitioner's source, petitioner argues that these statements are subject to at least two hearsay exceptions or exclusions: 1) an admission by a party-opponent is not hearsay in accordance with Rule 801(d); and 2) qualify as "statements against interest" as defined by Rule 804(b)(3). Finally, petitioner contends that the fact that Mr. Avazabadian made such statements in an environment where he had no expectation that the statements would influence the outcome of this case, is of no small relevance to the Department's evaluation of contrary statements made by Razi and Nima in this review.

Lastly, petitioner argues that Nima's own statements indicate that Razi "should have known" that its pistachios were for export to the United States. In reaching a finding of knowledge, petitioner claims that the Department need only consider the following: 1) Mr. Avazabadian's pre-sale knowledge that the pistachios were destined for export; 2) Mr. Avazabadian's pre-sale knowledge that Nima was involved in litigation associated with international tariffs; and 3) Mr. Avazabadian's pre-sale knowledge that the U.S. Government and, more specifically, the U.S. Department of Commerce, may be involved and may request information. Furthermore, petitioner contends that Nima's business plan to focus solely on pistachio exports to the United States, is consistent with correspondence between

Nima and its U.S. customer, Ann's House of Nuts (AHON), in which Nima announces that it had "been able to find a non-RPPC supplier in Domghan who meets all of our requirements with regards to proper documentations and future cooperation." *See* Nima's SQR at 5 and Exhibit 8. Because Rafsanjan Pistachio Producers Cooperative (RPPC) is an Iranian entity previously subject to both antidumping and countervailing duty reviews, petitioner claims that Nima's statement to its U.S. customer that it found a "non-RPPC supplier" can only mean that Nima was concerned that RPPC's involvement may somehow taint Nima's plans. Later in the same response, petitioner notes that Nima states "{t}he supplier, Razi-Domghan, did not have any knowledge of the ultimate destination of the subject merchandise." *See* Nima's AQR at 18. Reading those three statements together with an aim for consistency, petitioner argues that Nima's last statement can only be interpreted to mean that Razi knew or had reason to know that the pistachios were generally destined for the United States, but did not know that AHON was the "ultimate destination." Petitioner states that support for that proposition can be found in the preamble to Nima's SQR, wherein Nima states that it eliminated its middleman. *See* Nima's AQR at 3. Given Nima's actions, petitioner argues that it is only reasonable that Nima would not want Razi, its supplier, to know the identity of Nima's U.S. customer and, thus, to act in kind and eliminate Nima from the transaction, thereby spoiling Nima's plans to export to the United States. While Nima would not want to tell Razi the name of its U.S. customer, *i.e.*, the "ultimate destination," petitioner asserts that Nima would tell Razi of its plans to export the pistachios to the United States due to its concern over "proper documentation and future cooperation." Based on Nima's statements, petitioner argues that the Department's preliminary conclusion that Razi did not have knowledge is unsupported by substantial evidence on the record and should not be repeated in these final results. Accordingly, petitioner contends that the Department must rescind the instant review for lack of a reviewable U.S. sale by Nima during the POR.

Cal Pure Pistachios, Inc. (Cal Pure), an interested party to this proceeding, argues that the Department erred in finding that Razi had no knowledge that its sales to Nima were U.S. sales. In particular, Cal Pure claims that in the *Preliminary Results*, the Department ignored record evidence and utilized an incorrect evidentiary standard when it determined that Razi neither knew nor should have known that the pistachios it sold to Nima were destined for the United States. *See Preliminary Results* at 48199.

Cal Pure states that Nima's statements on the record relating to conversations its representatives had with Razi's owner indicate that Razi should have known that Nima would export its pistachios to the United States, despite its denial of knowledge of the specific destination. *See* Sales Verification Report at 4. Cal Pure notes that Razi, a family-owned pistachios farm, has been growing pistachios for more than 20 years. As such, Cal Pure states that Razi's owners are aware of the domestic and international markets for pistachios, including the fact that, due to import restrictions, large, well-established companies do not dominate the U.S. market as is the case in other markets. Further, as evidenced by Nima's prior new shipper review, Cal Pure asserts that small companies are increasingly seeking to participate in the U.S. pistachio market. Consequently, Cal Pure argues that when Nima approached Razi about purchasing pistachios and explained that it was involved in

"international tariff proceedings," it would (or should) have been obvious to Razi that Nima was an exporter. Moreover, Cal Pure states that when Nima told Razi that it might receive a questionnaire from the "U.S. Commerce Department," it would have been equally obvious to Razi that Nima had been involved in prior U.S. "tariff proceedings," *i.e.*, proceedings pertaining to its previous exports to the United States. Finally, Cal Pure contends that when Nima expressed that Razi's cooperation in providing information and business documents for the purpose of responding to a questionnaire was a condition for establishing a business relationship, it would have been obvious to Razi that Nima anticipated requiring Razi's active cooperation in a governmental proceeding. According to Cal Pure, since there was only one government actively involved in a proceeding related to pistachios, *i.e.*, the U.S. government, the eventual destination of Razi's pistachios was well-known to Razi.

According to Cal Pure, the Department in its *Preliminary Results* fashioned a "test" for determining whether Razi should have known the export destination of the pistachios by limiting its examination to unique factual circumstances that it examined in previous proceedings. Citing *Pasta from Italy* and *Synthetic Indigo from the PRC*, Cal Pure contends that in these cases the Department relied on specific factors alone (*e.g.*, pasta packaged with the name of U.S. importer or direct shipment to the United States) to determine that the producers in these cases knew of the ultimate destination of the sale. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo from the People's Republic of China*, 64 FR 69723, 69727 (December 14, 1999) (*Synthetic Indigo from the PRC*) (unchanged in final determination); and *Certain Pasta From Italy: Termination of New Shipper Antidumping Duty Administrative Review*, 62 FR 66602 (December 19, 1997) (*Pasta from Italy*). In contrast, Cal Pure states that, in *DRAMs*, the Department examined the relative size and nature of the purchaser's operations and the volume of the sales to the purchaser in order to determine whether the selling party should have known that the merchandise would be exported to the United States. Moreover, in *DRAMs*, Cal Pure claims that the Department did not require evidence that the respondent actually knew the ultimate destination of the merchandise. In addition, Cal Pure asserts that the Department has imputed knowledge to suppliers where they sold to traders which did not sell in the home market and all exports during the period of investigation were to the United States. *See, e.g., Final Determination of Sales at Less Than Fair Value: Fuel Ethanol from Brazil*, 51 FR 5572 (February 14, 1986) (*Fuel from Brazil*).

Based on all of the above, Cal Pure argues that the Department in its *Preliminary Results* considered only whether Razi actually knew that the pistachios were destined for export to the United States. Cal Pure claims that the four factors considered by the Department were not relevant to an examination of whether Razi should have known that its pistachios would be exported to the United States because each factor cited by the Department pertains to the issue of actual knowledge. Cal Pure argues, however, that the law also requires the Department to determine whether Razi should have known that the pistachios sold to Nima would be exported to the United States. Because the facts in each case are different, Cal Pure states that the Department must examine the evidence as a whole in each case to determine whether to impute knowledge. As the discussion above demonstrates, Cal Pure argues that there is ample evidence on the record of the instant review showing that Razi should

have known at the time of sales that the pistachios it sold to Nima were being exported to the United States.

Since, Cal Pure claims, the first party with knowledge of the U.S. destination of the sale was Razi and not Nima, Razi is the appropriate party to review. However, Cal Pure notes that Nima is the party that requested a review, not Razi. Therefore, Cal Pure asserts that consistent with the law and prior practice, the Department should terminate the review of Nima. *See Pasta from Italy* at 66602.

Nima claims that, from the beginning of the current review, it purposely did not reveal the ultimate destination of pistachios purchased from its suppliers, including Razi. Given the enormous amount of time and resources devoted to its participation in the instant review, Nima argues that it would have been irrational and reckless on its part had it not followed this fundamental requirement.

In rebuttal to arguments made by petitioner and Cal Pure, Nima explains that it was able to secure cooperation from Razi, without revealing the ultimate destination of the pistachios it supplied to Nima, by gaining Razi's confidence and promising future business opportunities. In particular, Nima asserts that the fact that Razi's owner signed the certification on December 31, 2003, in and of itself does not indicate that Razi should have known the final destination of its sale to Nima. Moreover, Nima argues that the date of the signature in question occurred well after the sale of pistachios between Razi and Nima, and therefore, is irrelevant. Nima states that it presented itself to Razi as an international exporter of pistachios and that it might in the future request some information regarding Razi's operations. Nima notes that as far as Razi knew Nima could have sold the pistachios in any foreign market (*e.g.*, Japan, Hong Kong, South America, Canada, *etc.*) because like many suppliers of agricultural products Razi was not concerned with where Nima would sell the pistachios.

Nima presents several scenarios in response to petitioner's questioning of the level of trust between Razi, Nima, and Mr. Valibeigi. *See* Nima's rebuttal brief at 4. Contrary to petitioner's claim that Razi received a Farsi version of the WPA Newsletter, Nima states that Razi did not receive, and has yet to receive, a translated version of the newsletter. Indeed, Nima asserts it first learned that a Farsi version of the newsletter existed in petitioner's case brief. According to Nima, upon receipt of the English version of the newsletter, Mr. Avazabadian had indicated his concern with respect to the content of the letter which was not known to him. In order to reassure Mr. Avazabadian, Nima states that Mr. Valigeibi explained to him that the content of the letter was irrelevant and should be of no concern, and that he hoped that Mr. Avazabadian would trust Nima to proceed with its attempt to lower the international tariff on Iranian pistachios.

In rebuttal to Nima's arguments, petitioner claims that notwithstanding Nima's purported "Code of Silence," a fair reading of the record can lead only to a conclusion by the Department that Razi knew or should have known, at the time of its sale to Nima, that the pistachios were for export to the United States. Petitioner reiterates that Nima's alleged policy to not reveal the ultimate destination of the pistachios to Razi relates to an irrelevant time period, *i.e.*, "from the beginning of the current review."

See Nima's case brief dated September 8, 2004, at 1. Petitioner asserts that the relevant question is whether Razi knew or should have known, at the time of its sale to Nima, that the pistachios were for export to the United States. *See DRAMs* at 64 FR 69694. Petitioner states that the sale from Razi to Nima allegedly took place on May 17, 2003. *See* Nima's SQR at Exhbit 1.1. Therefore, petitioner contends that Nima's adoption of a policy against disclosure of the "ultimate destination" of subject merchandise more than three months after the sale is of no consequence to the issue of whether, under section 773(a) of the Act, Razi's sale to Nima was the relevant "export price" sale.

Moreover, petitioner contends that if Nima had such a "policy" in place it would have mentioned it prior to the Department's issuance of the *Preliminary Results*. Further, petitioner notes that there is no written record of Nima's alleged policy – no policy statement, no correspondence, no faxes, no memos, no minutes of corporate meetings in which it was discussed. Regardless of Nima's alleged policy, petitioner argues that the conflicting accounts provided by Nima and Razi cannot be reconciled or believed.

Throughout this review, petitioner claims that Nima has hidden behind the convenient ambiguity of the phrase "ultimate destination" in responding to questions about Razi's knowledge that the pistachios were for export to the United States. Petitioner notes that the relevant portion of the antidumping statute, section 773(a) of the Act, does not use the phrase "ultimate destination." According to petitioner, knowledge of the "ultimate destination" is not the relevant legal issue here. Rather, petitioner states that the relevant legal issue under the statute is whether the sale by Razi to Nima was when "the subject merchandise {was} first sold (or agreed to be sold) before the date of importation by the producer . . . to an unaffiliated purchaser for exportation to the United States." *See* 19 USC § 1677a(a). Petitioner claims that, though queried several times about Razi's knowledge, Nima has never forthrightly stated on the record that Razi was unaware that the pistachios were for export to the United States.

In summary, petitioner argues that the factual record demonstrates that, notwithstanding the alleged existence of Nima's non-disclosure policy, Razi knew or should have known, at the time of its sale, that the pistachios were for export to the United States.

In rebuttal to Nima's arguments, Cal Pure asserts that Nima's statements basically state that Nima did not directly inform Razi of the pistachios' "ultimate" destination, which addresses only the first element of the Department's examination, *i.e.*, whether Razi actually knew that Nima would export the pistachios to the United States. Moreover, Cal Pure states that Nima's assertion is expressly limited to describing Nima's actions, as it is completely silent as to Razi's knowledge. Cal Pure notes that Nima failed to address the second element of the Department's examination.

Cal Pure reiterates that the Department must examine whether Razi should have known the export destination and consider all of the evidence on the record in reaching its final determination. Cal

Pure notes that this evidence includes Nima's statements to Razi about its involvement in "international tariff proceedings" and the fact that Razi might receive a questionnaire from the Department, and Nima's insistence on Razi's cooperation in providing information and documents in order to respond to a questionnaire. Given that Nima is an export company and had unusual questions and demands of Razi in the course of their negotiations for the purchase of pistachios, during which Nima explicitly mentioned the United States but no other country, Cal Pure argues that the only reasonable conclusion is that Razi should have known that Nima was planning to export the pistachios to the United States. To find otherwise, Cal Pure contends, the Department would have to presume that Razi's owners lacked the basic intelligence to understand the purpose of Nima's comments and questions.

As there is no reasonable basis for believing that Razi's owners would fail to understand Nima's intent, Cal Pure claims that the Department must determine in these final results that Razi should have known that the pistachios Nima purchased would be exported to the United States. Consequently, Cal Pure argues that the Department must terminate Nima's review, as it is not the appropriate party to review, pursuant to section 773(a) of the Act.

Department's Position:

We disagree with petitioner and Cal Pure and, after considering all factual information on the record of this review, continue to find that Razi neither knew nor should have known that the merchandise under review was destined for export to the United States at the time of the sale.[1]

First, we disagree with petitioner and Cal Pure that our approach to determining knowledge in this administrative review is inconsistent with prior practice and unlawful. In fact, our approach is based on prior practice, which has been upheld by the courts. *See, e.g., Wonderful Chemical Indus v. United States*, 259 F. Supp. 2d 1273 (CIT 2003). The standard for the "knowledge test" is high. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 FR 10900, 10951-10952 (Feb. 28, 1995). In general, the Department's practice has been to consider documentary or physical evidence that the producer knew or should have known its goods were destined for the United States, because this type of evidence is more probative, reliable and verifiable than unsubstantiated statements or declarations. Of course, this is not the only type of evidence that the Department will consider. In some cases, the Department might find other evidence to be relevant to the knowledge issue. Thus, contrary to petitioner's claims, we have not developed a "closed-ended"

[1] The Department allowed parties additional time with which to submit written comments and any additional documentary evidence based on factual information that would indicate whether Razi did or did not have knowledge that the goods in question were destined for the United States at the time of the sale. We received additional statements from Nima only, reiterating that Razi did not know the ultimate destination of the pistachios it sold to Nima.

test.

As noted above, our approach in this case is consistent with established practice. For example, in prior cases, the Department has considered whether the relevant party prepared or signed any certificates, shipping documents, contracts, or other such documents stating that the merchandise was destined for the United States. *See Synthetic Indigo from the PRC*, at 69727. The Department has also considered whether the relevant party used any packaging or labeling stating that the merchandise was destined for the United States. *See Pasta from Italy*, at 66602. Additionally, the Department has examined whether the features, brands, or specifications of the merchandise indicated that it was destined for the United States. *See, e.g., GSA, S.R.L. v. United States*, 77 F. Supp. 2d 1349, 1355 (CIT 1999); *Pasta from Italy*, 62 FR 66602 (December 19, 1997). These factors considered by the Department in past knowledge determinations were relied upon by the Department in order to determine whether the producer had constructive knowledge (*i.e.*, should have known) that the goods were destined for the United States. *See Wonderful Chemical*, 259 F. Supp. 2d at 1279. In other words, we were able to determine whether or not a producer should have known that its merchandise was destined for export to the United States by examining evidence on record that the producer or relevant party used packaging or labeling materials unique to U.S. sales of the merchandise under investigation or review or signed documentation stating the ultimate U.S. destination.

Of course, actual knowledge, while sometimes difficult for the Department to establish, will also satisfy the Department's knowledge standard. Thus, an admission by the producer or a representative of the producer to the Department that it knew of the ultimate U.S. destination can also establish knowledge. In *DRAMs*, the individual who had been the world-wide sales manager for the relevant company during the POR told the Department that he knew that the merchandise was destined for the United States. Customs entry information corroborated the admissions of this individual. Therefore, based on this information, including the statements of admission, the Department found that the company had knowledge of the ultimate U.S. destination.

It is important to note that a general knowledge or belief on the part of a producer that an exporter sells to the United States is insufficient to establish knowledge with respect to particular sale(s). Rather, the standard for making a knowledge determination is that the producer must have reason to know *at the time of the sale* that the *specific sales* of subject merchandise were destined for the United States. *See Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation*, 66 FR 49347 (September 27, 2001) (*Magnesium from Russia*), and accompanying Issues and Decision Memorandum at Comment 3. The possibility that the producer may have speculated that the goods might ultimately be destined for the United States is insufficient for a knowledge determination. Rather, the standard is whether the producer knew or should have known at the time of the sale that the goods were destined for the United States.

As described below, none of the normal factors indicative of knowledge are present in this

case. While the record contains some conflicting statements regarding the specific point in time at which Razi became aware that the pistachios sold to Nima were ultimately exported to the United States, these statements relate primarily to points in time after the date of the relevant U.S. sale. In the absence of any substantive evidence, we find that the record does not support a finding that Razi either knew or should have known at the time of the sale that the pistachios it sold to Nima were destined for the United States.

Specifically, we find that there is no record evidence that Razi prepared or signed any documentation relevant to the shipping, handling, and packing of the merchandise for export during the POR. Instead, the record clearly indicates that Nima, not Razi, prepared and signed all certificates, shipping documents, contracts or other papers identifying the destination of the merchandise as the United States. *See* Nima's September 19, 2003, section A questionnaire response (Nima's AQR) at Exhibit 6. Moreover, the record is void of evidence that Razi used any packaging or labeling which stated that the merchandise was destined for the United States. Rather, the record indicates that Nima re-packed the merchandise (Razi sold 154 kg. of pistachios to Nima packed in 60 kg. capacity bags) for shipment to the United States. *See* Nima's SQR at 6. *See also* Sales Verification Report at 6. Further, there were no unique features of the merchandise that would otherwise indicate that it was destined for the United States.

In addition, as noted above, the Department carefully analyzed Nima's response recounting conversations that it had with Razi around the time of the sale. In particular, Nima informed Razi that "because Nima was involved in litigation involving international tariffs on its pistachios," some "foreign countries may demand some information" from Razi, and Razi might receive a questionnaire from some foreign government, including the U.S. government or "commerce department." *See* Nima's SQR at 2, 3 and 10. We find that these statements are insufficient to establish knowledge. These statements indicate only that Nima was or is involved in proceedings related to international tariffs on pistachios, and that some foreign governments, including the U.S. government, might request information from Razi in this regard. Nima's statements related to its general business and export practices. While these statements may have indicated that the pistachios were destined for export, Nima did not indicate to Razi the market to which the pistachios would be shipped. In fact, Nima stated that it "did not disclose to Razi where the final destination of his pistachio was." Nima's SQR at 3.

Consistent with *Magnesium from Russia*, we find that Nima's statements, which relate to Nima's general business and export practices, do not establish that Razi knew or should have known at the time of sale that the pistachios it sold to Nima were destined for the United States. The fact that Nima mentioned the U.S. government as one of the foreign governments which might request information from Razi might have caused Razi to suspect that the pistachios might ultimately be destined for the United States, but such a suspicion does not equate to actual or constructive knowledge. "The test employed by Commerce is not whether, in theory, the merchandise could have arrived in the United States," but rather whether the supplier knew or had reason to know of the U.S. destination. *See Timken Co. v. United States*, 166 F. Supp. 2d 608, 633-34 (CIT 2001). In *Timken*, the CIT

found that the fact that the merchandise was marked with the name of a U.S. company was insufficient to establish knowledge of the U.S. destination. The Court noted that the presence of the markings did not mean that the manufacturer made the mental connection between the markings and the U.S. destination, and that even if the manufacturer did make such a connection, this was insufficient to create the requisite level of knowledge. *Id.* at 633. Similarly, even if Razi might have speculated or inferred a U.S. destination from Nima's statements, this does not create the requisite level of knowledge.

With respect to *Fuel from Brazil*, the Department in that case imputed knowledge to Brazilian distillers of ethanol that supplied two respondents during the period of investigation based on the following: 1) one of the respondents admitted on the record that its suppliers knew at the time of the sales that the ethanol was destined for the United States; and 2) record evidence of the Brazilian ethanol industry supported a finding by the Department that the only export market for the subject merchandise during the period of investigation was the United States. *See Fuel from Brazil*, at 5572. As noted above, contrary to the case in *Fuel from Brazil*, neither Nima nor Razi have admitted to Razi having knowledge at the time of sale that the pistachios were destined for the United States. Moreover, the record in the instant case does not indicate that the only export market for Iranian pistachios is the United States. Rather, as noted in Nima's AQR, for the majority of pistachio farmers in Iran, including Razi, it is common knowledge that it is currently difficult or impossible to export to the United States. *See* Nima's AQR at 18. We note that since the lifting of trade sanctions on Iran with respect to certain products, contrary to Cal Pure's assertion, Nima has been the only small Iranian company with a demonstrated interest of participating in the U.S. market, as evidenced by its participation in the instant and previous proceedings. Moreover, statements made by petitioner in its May 18, 2004, filing also indicate that Iranian citizens, *e.g.*, the owner of Razi, have a reasonable fear that they may be criminally prosecuted for providing information to the Department in this proceeding, especially given the importance of pistachios to the Iranian economy. *See* petitioner's May 18, 2004, filing. *See also* the U.S. State Department's *Country Reports on Human Rights Practices - 2002* (March 31, 2003), submitted for the record by petitioner on January 28, 2004.

During verification, the general manager of Razi stated that he first learned that the pistachios he sold to Nima were exported to the United States in May 2004, approximately a year after the date of the sale. *See* Sales Verification Report at 4. It is clear from the statements made by Razi's general manager during verification that Razi did not admit to the Department that it knew that its sales were destined for the United States at the time of its sale to Nima. Therefore, contrary to petitioner's and Cal Pure's claims, we do not find that Nima's account of conversations it had with Razi during the POR compel the Department to find that Razi had knowledge as interpreted under section 772(a) of the Act. Moreover, the exact post-sale date when Razi first knew of the U.S. destination is irrelevant. As the Department has explained, the relevant date for purposes of determining knowledge is the date of sale, May 2003.

In reaching our decision with respect to knowledge, we have considered the record in its entirety, including record information that does not fall under the factors considered by the Department

in previous cases. Specifically, contrary to petitioner's assertion, the Department did consider the Schramm Declaration in its preliminary knowledge determination. The Schramm Declaration is a sworn affidavit recounting a conversation between Robert I. Schramm of Schramm, Williams & Associates (SWA) and an Iranian citizen, in which the Iranian citizen (paid by SWA to gather information regarding Iranian laws and business practices) tells of an alleged meeting and conversation with one of Razi's owners, Mr. Avazabadian.[2] We note that Mr. Schramm is a member of an agricultural consulting firm in Washington, DC, which has advised petitioner on the Iranian pistachio industry and imports of pistachios from Iran for approximately 20 years. *See* Schramm Declaration at Exhibit 1. In this sworn affidavit, based on information provided to Mr. Schramm by an Iranian citizen, Razi was allegedly informed by Nima, on or before the date of Razi's sale to Nima of the pistachios at issue in this review, that the pistachios were destined for export to the United States. In particular, in the conversation with Mr. Schramm, the Iranian citizen allegedly claims that during their meeting, Mr. Avazabadian stated that, in his initial meeting with Nima's representatives, such representatives had explicitly stated that the pistachios they wished to purchase from Razi were destined for export to the United States. *See* Schramm Declaration at Exhibit 1. Given, however, the nature of the information contained in the Schramm Declaration, which consists of uncorroborated third-party conversations that allegedly transpired between an individual paid by an entity sympathetic to petitioner and the owner of Razi. We do not find this declaration to be compelling evidence that Razi knew or should have known the ultimate U.S. destination of the merchandise. Thus, the Department cannot reach a finding of knowledge in this case.[3]

In summary, the record of this case is devoid of any of the normal factors, as developed in prior cases, that indicate knowledge. At best, the record contains some conflicting statements regarding the specific point in time, after the date of sale, at which Razi became aware that the goods had been exported by Nima to the United States. Nima stated in its supplemental questionnaire response that it "did not disclose to Razi where the final destination of his pistachio was," and Mr. Avazabadian stated at verification that he did not know of the U.S. destination until approximately one year after the date of sale (*i.e.*, May 2004). *See* Sales Verification Report at 4. We find that, in the absence of substantive evidence to the contrary indicating knowledge, there is insufficient basis to find that Razi knew or should have known of the ultimate U.S. destination of the pistachios sold to Nima.

Thus, in considering the totality of record information, we continue to find that the record does not support a finding that Razi either knew or should have known at the time of sale that the pistachios it sold to Nima were destined for the United States.

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[2] This alleged meeting between the Iranian citizen and Mr. Avazabadian occurred well after the date of Razi's sale of 154 kilograms (kg.) of pistachios to Nima.

[3] We note that in *DRAMs* the Department was able to corroborate the allegations made by a former world-wide sales manager with customs entry documentation. *See DRAMs*, at 69717.

Comment 2: Application of Combination Rate for Nima's U.S. Sales of Pistachios Produced by Razi Domghan Agricultural and Animal Husbandry Company

Citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27303 (May 19, 1997) (the *Preamble*), petitioner claims that if the Department determines that either Razi lacked the requisite knowledge of the ultimate U.S. destination of the pistachios it sold to Nima, or that Nima's single sale to AHON falls within the legal parameters required for a *bona fide* sale, and thereby, denies the petitioner's request to rescind this review, a combination rate should apply to the merchandise produced by Razi and sold by Nima.

Petitioner states that establishing a deposit rate for an exporter, without regard to the identity of the supplier, and applying that rate to all future exports by that exporter could lead to an unscrupulous exporter arranging export sales from both producers with high specific deposit rates and those subject to a high "all others" rate. Petitioner argues that exporters could then circumvent the Department's goal of "only associat{ing} dumping with the party or parties responsible for it." *See Tung Mung Development Co., Ltd. v. United States*, 354 F.3d 1371, 1377 (citing the Department's redetermination in *Tung Mung Dev. Co. v. United States*, (No. 99-06-00457)).

In the event that Nima should receive a relatively low deposit rate in this administrative review, petitioner questions what would prevent any grower subject to a high deposit rate from using Nima as a gateway through which to sell its pistachios to the United States. Petitioner argues that by applying a combination rate, the Department can ensure that a legal dam is built to prevent a potential flood of imports of pistachios from Iran.

Cal Pure contends that if the Department determines that there is no basis to find that Razi knew or should have known that its sale of pistachios to Nima were for export to the United States, the Department should assign a producer/exporter combination rate to Razi and Nima. Citing the Preamble of the Department's regulations, Cal Pure states that 19 CFR § 351.107(b) was established in anticipation of conducting reviews for non-producing exporters with the intention that it would generally apply to situations where the producer did not know the ultimate destination of the sale. *See Preamble* at 62 FR 27303.

Cal Pure claims that the Department adopted this regulation in order to prevent manipulation of rates in situations where producers that know the subject merchandise will be exported to the United States sell to trading companies for export. According to Cal Pure, in the instant review, Nima has acknowledged its intention to use the results of this review to begin purchasing and exporting from other Iranian producers, and it has demonstrated its ability and intention to identify multiple potential suppliers. *See* Nima's AQR at Exhibit 8. Thus, Cal Pure asserts that if the Department were to calculate a rate for Nima that is lower than the "all others" rate and did not then restrict the rate to the combination of Nima/Razi, Nima would be able to export pistachios purchased from other Iranian producers that may have knowledge of the U.S. destination and for which the Department has

established specific rates. Moreover, Cal Pure argues that Nima could flood the U.S. market with sales of pistachios not examined by the Department and properly subject to the "all others" rate.

Based on the Department's regulations and normal practice, Cal Pure states that the Department generally establishes combination rates for non-producing exporters except in cases involving: 1) respondents which are not trading companies, such as original equipment manufacturers; 2) a large number of producers supplying a single exporter; 3) non-market economy trading companies, except where the Department has excluded a specific exporter from an antidumping duty order; and 4) producers which sold to the exporter with knowledge of exportation to the United States. If the Department continues to find that Razi did not have knowledge of the destination of the sale, Cal Pure asserts that none of the exceptions noted above are relevant in this case.

Finally, Cal Pure notes that in the new shipper review involving Nima the Department found it appropriate to apply a combination rate to Nima and its supplier, Maghsoudi, to prevent Nima and other producers from manipulating the results of the review by shipping large quantities of pistachios through Nima. *See Certain In-Shell Raw Pistachios from Iran: Final Results of Antidumping Duty New Shipper Review*, 68 FR 353 (January 3, 2003) and accompanying Issues and Decision Memorandum at Comment 10. Thus, for the reasons discussed above, Cal Pure argues that the antidumping duty rate calculated for Nima in this review should be restricted to the combination of Nima and Razi.

Respondent did not comment on this issue.

Department's Position:

We agree with petitioner and Cal Pure. As set forth under section 351.107(b)(1) of its regulations, in the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Department may establish a "combination" cash deposit rate for each combination of the exporter and its supplying producer(s). Given the unique circumstances in this case, we find it appropriate and necessary to establish a combination rate for sales of pistachios exported by Nima and produced by Razi.

In reaching this conclusion, we have considered the following factors: 1) the similarity of Nima's U.S. sale subject to this review and Nima's U.S. sale in the previous new shipper review; 2) Nima's normal business practice of selling pistachios only to the U.S. market; 3) Nima's ability to source the pistachios it sells from a large pool of suppliers; and 4) the deposit rates for other producers subject to this order and the "all-others" rate. We address each of these factors below.

First, with respect to the similarity of Nima's sale under review with its previous new shipper sale, as noted in our *Preliminary Results* and in our analysis of *bona fides*, we find that several key characteristics are similar if not identical, including material terms of sale (*e.g.*, price and quantity) and

method of transport. We also note that in each case Nima made only a single sale of subject merchandise in the entire POR. Because, by nature, Nima's single sale to AHON in the instant review is very similar to that of its new shipper sale, in which a combination rate was applied, the Department finds a compelling argument for establishment of a combination rate for Nima and Razi in this segment of the proceeding. We also note that the fact that Nima sourced from only one supplier makes it administratively feasible for the Department to establish a combination rate for the sole combination of exporter and producer subject to this review.

Second, with respect to Nima's normal business practices, throughout this proceeding, Nima has stated that it "has not attempted to focus on the Iranian or other foreign country markets," and thereby, has limited its sales of pistachios to the United States. *See* Nima's AQR at 8. As such, it is reasonable to conclude that Nima will continue to export pistachios from Iran only to the U.S. market. Thus, any future reviews involving Nima will likely require the use of constructed value to determine normal value. The major components of constructed value in this case are the actual costs of production and profits of the grower/supplier of pistachios. The margins of dumping, therefore, could vary greatly from producer to producer based on the nature of an individual producer's operations (*e.g.*, size, age of pistachio trees, efficiency, *etc*.). Therefore, we find it appropriate to establish a combination rate in this case reflective not only of the exporter's pricing practices but also of the actual producer's costs and profit.

Third, with respect to the potential number of suppliers in Iran, Nima was able to identify several alternative producers. *See* Nima's AQR at Exhibit 8. We note that the producer/supplier of subject merchandise in this review is different from the producer/supplier Nima chose to source from in the new shipper review, thereby signifying an ability and willingness on the part of Nima to change suppliers from one segment of this proceeding to another as it sees fit.

Lastly, in examining the deposit rates currently in effect under this order, we note the substantial disparity between the "all others" rate currently in effect (*i.e.*, 184.28 percent), another producer, RPPC's, rate in effect (*i.e.*, 184.28 percent), and Nima/Maghsoudi Farms rate as calculated in the new shipper review (*i.e.*, 144.05 percent), as compared to the rate calculated for Nima in the instant review. As stated in the *Preamble*, establishing a deposit rate for an exporter, without regard to the identity of the supplier, and applying that rate to all future exports by that exporter could enable a producer with a relatively high deposit rate to avoid the application of its own rate by selling to the United States through an exporter with a low rate. *See Preamble*, 62 FR at 27303. Given the large pool of suppliers of pistachios in Iran and the significant disparity in existing deposit rates and Nima's relatively low margin in this review, we find it appropriate to establish a combination rate reflective of the actual experience of the exporter and producer examined in this review.

In light of the unique facts and circumstances of this case, therefore, as outlined above, and in order to ensure the proper application of deposit rates, the Department finds it appropriate in this review to establish a deposit rate for Nima in combination with its supplier and producer of the subject

merchandise, Razi.

Comment 3: *Bona Fides* of Tehran Negah Nima Trading Company, Inc.'s U.S. Sale

Petitioner asserts that the Department's "totality of circumstances" analysis for evaluating the *bona fides* of U.S. sales supports a finding that Nima's single sale to AHON is not a *bona fide* transaction. According to petitioner, in conducting its analysis of the *bona fides* of a transaction, *i.e.* whether the transaction is "unrepresentative or distortive," the Department generally considers: (1) whether the transaction was at arm's length; (2) whether the transaction was consistent with good business practices; and (3) whether the merchandise was sold pursuant to procedures typical of the parties' normal business practices. *See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Administrative Review*, 63 FR 47232 (September 4, 1998) (*Plate from Romania*) *aff'd Windmill v. United States*, 193 F. Supp. 2d 1303, 1312 (CIT 2002). Moreover, petitioner states that the Department reviews the *bona fides* of a transaction that it believes may be "clearly atypical" to determine whether the use of the sale in its methodology "would undermine the fairness of the comparison of foreign and U.S. sales."

Petitioner claims that the quantity and price of Nima's single sale of pistachios to AHON can only by considered "atypical." Petitioner notes that in a prior proceeding the Department found Nima's new shipper sale to be a test sale between two parties that had not had a prior business relationship. With the "honeymoon" now over, petitioner states that AHON still only requests 600 pounds of raw pistachios, but it is fully prepared to purchase a 20-ton container of roasted pistachios. *See* Nima's AQR at Exhibit 8. Petitioner contends that, in the instant review, Nima and AHON appear to have limited their sales activity in order to "artificially orchestrate an export scheme involving artificially set prices." Even if Nima were able to comply with AHON's 600 pound order, petitioner claims that such a quantity can hardly be considered normal business practice and, if 600 pounds is not normal, a 220 pound (*i.e.*, 100 kg.) shipment is aberrational in the extreme.

According to petitioner, the price at which Nima sold the pistachios to AHON (*i.e.*,100 kg. of pistachios for $755.00 FOB, U.S. airport), is atypical. *See* Nima's October 14, 2003, section C questionnaire response (Nima's CQR) at Exhibit 2. Petitioner asserts that the exorbitantly high costs, including air freight expenses of 67 percent of the cost of pistachios compared to the price of the merchandise, makes purchases of pistachios using similar logistical arrangements, cost-prohibitive and, thus, inconsistent with good business practices.

Citing *Plate from Romania*, petitioner notes that one of the circumstances the Department determined to be relevant in its analysis of whether the sale was atypical, was the decision to send the shipment by air, rather than by ocean, in order to enter the merchandise into the United States before the end of the POR. *See Plate from Romania*, 63 FR at 47233. Given that the pistachios under review were shipped by air and entered the United States 5 days prior to the end of the POR, petitioner insists that the only reason Nima shipped the pistachios via air was to ensure that it had a sale

for purposes of the instant antidumping administrative review. Further, petitioner claims that such instances (*i.e.*, imports of pistachios by air) are contrary to AHON's normal business practices.

To the extent that the Department is still not satisfied that the quantity and price of the sale of pistachios between Nima and AHON are atypical, petitioner states that it should follow its past procedure and query the U.S. Census Bureau for import statistics regarding the volume and value of typical shipments of pistachios. *See, e.g., Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China*, 60 FR 56045 (November 6, 1995).

Lastly, petitioner argues that there can be no question as to whether the transaction at issue is part of an "artificially orchestrated . . . export scheme" and on terms other than at arm's- length, because: (1) Nima required a supplier that was specifically unaffiliated with RPPC, an entity previously involved in U.S. antidumping and countervailing duty proceedings; (2) Nima required a supplier that would respond to queries with proper documentation and cooperate in the proceedings if requested to do so by the U.S. Government; (3) Nima and AHON structured the sale such that the latter would not be overly exposed with regard to antidumping liability, *e.g.*, "{g}iven the results of the AD and CVD, we would like to limit our order to small amounts as the tariff levels are still too high," AHON (*see* Nima's AQR at Exhibit 8); and (4) Mr. Valibeigi is both a former owner of Nima, and "other representative" representing Nima in this proceeding, and related, by marriage, to an individual that owns 89.10 percent of Nima shares. Moreover, petitioner argues that, in light of Mr. Valibeigi's business plan to focus on the U.S. market, his knowledge of U.S. antidumping proceedings, no record evidence of price negotiations, and the fact that Mr. Valibeigi is affiliated with a person who hold 89.10 percent of Nima's shares, it is more than likely that the price was contrived to avoid dumping liability. *See Windmill* 193 F. Supp. 2d 1303, 1312 (CIT 2002).

Considering the totality of the circumstances surrounding Nima's sale to AHON, petitioner insists that the Department can reach no conclusion other than the sale is devoid of the *bona fides* necessary for the Department's analysis, and therefore, the Department should rescind Nima's administrative review. *See, e.g., Plate from Romania*, 63 FR at 47233.

Respondent did not comment on this issue.

Department's Position:

We disagree with petitioner. Based on our analysis of information submitted by Nima, and our verification thereof, we continue to determine that Nima's sale to the United States constitutes a *bona fide* commercial transaction. *See Preliminary Results* at 48199. As stated in our *Preliminary Results*, in the recent new shipper review involving Nima the Department faced similar facts and concluded that Nima's sale albeit of a relatively small quantity of pistachios, shipped via air freight was a *bona fide* arm's-length transaction. *See Final Results of Antidumping Duty New Shipper Review:*

Certain In-Shell Raw Pistachios from Iran, 68 FR 353 (January 3, 2003) and accompanying Issues and Decision Memorandum at Comment 2.

With respect to petitioner's argument regarding quantity, while we note that the quantity of Nima's U.S. sale is small, established Department practice provides that the size of a transaction is not sufficient, in and of itself, to warrant a finding that the transaction is not *bona fide*. The Department has stated that "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." *See Certain Cut-to-Length Carbon Steel from Romania: Rescission of Antidumping Duty Administrative Review*, 63 FR 47234 (September 4, 1998). While the quantity of Nima's U.S. sale is of concern, the Department finds no evidence that Nima's sale to the United States was commercially unreasonable or involved selling practices atypical for a shipper of pistachios (*see* discussion below). By contrast, given that the quantity of Nima's U.S. sale currently under review is similar to the quantity of its new shipper sale, we find that the quantity of the sale appears to be in line with Nima's current business practices. Therefore, there is no evidence on the record to indicate that the transaction between Nima and the U.S. importer/customer, AHON, an established distributor of nuts in the U.S. market, was not a commercially reasonable transaction merely by reason of its small quantity.

With respect to the issue of air freight and its effect on the price of the U.S. sale, we do not find evidence on the record of this review that the unit price charged by Nima or the total costs borne by the U.S. importer, AHON, are commercially unreasonable or otherwise "atypical." Petitioner's reliance on the Department's *bona fide* determination in *Plate from Romania* in the instant case is misplaced. In *Plate from Romania*, the Department considered not only the transportation costs paid by the U.S. importer in that case but also additional expenses borne by the U.S. importer in connection with the sale. *See Plate from Romania*, 63 FR at 47234. Importantly, the Department found in that case that "the merchandise was subsequently resold at a significant loss (excluding transportation and other costs)." *See Id*. We note that there is no evidence on the record of this review that AHON resold the merchandise at a loss.

Furthermore, although the pistachios in question were shipped by air and entered the United States 5 days prior to the end of the POR, we do not find that this leads to a finding that the sale was not *bona fide* or that timing played a role in Nima's/AHON's decision to ship the merchandise via air. In particular, the record contains pre-sale correspondence on the record between Nima and AHON's president indicating that since February 20, 2003, AHON was interested in purchasing pistachios from Nima. However, as explained in its March 17, 2003, letter to AHON, Nima had to find another supplier of pistachios as its previous supplier did not have any pistachios to sell, which prevented Nima from shipping the pistachios to AHON at an earlier point in time. *See* Nima's AQR at Exhibits 8 and 9. We note that there is no evidence on the record to support petitioner's assertion that AHON's importation of pistachios by air is atypical. Rather, it seems that it is AHON's current business practice to import pistachios from Iran via air transport as evidenced by the chosen method of transport in the

instant and new shipper reviews.

Furthermore, the Department examined the average unit values (AUVs) and volume of imports into the United States of pistachios from all countries, including Iran, during the POR. We compared the unit price of Nima's U.S. sale to the average prices of other Iranian pistachio imports during the POR, as well as to the AUVs of pistachio imports from all countries during the POR. In making these comparisons, we note that the unit price of Nima's U.S. sale was comparable to the prices of other Iranian imports of pistachios. In comparison to the industry-wide AUV of U.S. imports of pistachios from all countries (specific to the POR for entries under HTSUS subheading 0802.50.20.00), Nima's U.S. sale price is reasonable. It is the Department's practice to consider, among other things, U.S. import AUVs from all countries as such data is reasonably objective representing, as it does, a wide breadth of values sourced from countries around the world. *See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of New Shipper Review and Final Results and Partial Rescission of the Third Administrative Review*, 68 FR 41304 (July 11, 2003) and accompanying Issues and Decision Memorandum at Comment 2. In making this comparison, we also note that other sales of pistachios shipped to the United States during the POR had AUVs higher than Nima's AUV.

Finally, we do not find that Nima's sale of pistachios to AHON is part of an "artificially orchestrated . . . export scheme" and on terms other than at arm's-length, as suggested by petitioner. Specifically, Nima's decision to pursue a supplier that was not affiliated with RPPC, and that would cooperate in responding to inquires for documentation relating to its business activities, as well as AHON's decision to order small quantities in order to limit its exposure to high dumping liabilities, are commercially reasonable business decisions for companies participating in an antidumping proceeding. Additionally, we note that the fact that Nima's representative, Mr. Valibeigi, is related, by marriage, to one of Nima's shareholders is not relevant to the Department's analysis as to whether Nima's U.S. sale of pistachios to AHON was made at arm's-length. Significantly, there is no evidence on the record that supports a finding of affiliation between Nima and AHON, Nima and Razi, or Razi and AHON, nor evidence of the existence of a preferential sales price. Therefore, we find that the sale of pistachios between Nima and AHON was not contrived to avoid dumping liability or on terms other than at arm's-length.

With regard to other terms of sale and the legitimacy of the negotiation process, we note that the agreement on price between the seller, Nima, and the U.S. buyer appears to have been reached through a credible negotiation process. *See, e.g.*, Nima's AQR. Specifically, the result of this negotiation process (*i.e.*, an invoice) between the parties shows a seller seeking to maximize revenue

and a buyer seeking to minimize cost and risk. There is no evidence on the record that during negotiations the parties were not concerned with making a profit. *See Freshwater Crawfish Tail Meat from the People's Republic of China; Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439 (January 10, 2003) and accompanying Issues and Decision Memorandum at Comment 1. Therefore, we find that the selling practices reflected in Nima's U.S. sale, including the timing of the order, invoicing, shipment, and expenses, do not appear unusual. *See* Nima's AQR at Exhibits 8 and 9. Moreover, there is no information on the record questioning the legitimacy of the buyer, seller, payment or delivery terms for Nima's U.S. sale.

Based on the totality of evidence on the record, we do not find that Nima's sale to AHON was conducted contrary to normal business practices or commercially unreasonable. As a result, we find Nima's U.S. sale to be a *bona fide* transaction and that rescission of this review is therefore unwarranted.

Comment 4: Calculation and Application of Constructed Value Profit

Petitioner and Cal Pure argue that the Department must use the farmer's own profit experience in computing Nima's CV profit rate instead of using surrogate data from a previous proceeding. Petitioner contends that the Department should use a profit rate contemporaneous with the POR. Cal Pure points out that Nima and Razi have confirmed the representativeness of Razi's sales and thus, its actual profit. In particular, they claim that: 1) Razi has provided a complete list of its home market sales of the foreign like product made during the POR; 2) those sales represented current market conditions as confirmed by Nima through a written statement; and 3) the Department verified Razi's cost of production and made adjustments where necessary.

In addition, petitioner references the Act which states that when a company has no home market profit, the Department is directed to use an alternative home market profit rate. In looking at the three options for the profit rate, petitioner contends that for the current situation, the Department must use the third option (*i.e.*, any other reasonable method). Based on similarity of operations, the extent to which Razi's sales represent sales in the home market, and the contemporaneity of the data, petitioner and Cal Pure claim that it is clear that Razi's actual data is the best surrogate for Nima's profit rate amongst the options available. In addition, petitioner and Cal Pure assert that Razi's data is the best option for calculating CV profit as it: 1) constitutes the actual data of the producer in this proceeding; 2) was verified by the Department; and 3) reasonably reflects the costs and profits associated with the production and sale of pistachios. Petitioner and Cal Pure argue that Fallah's information does not meet this threshold and is most distinguished from Razi's information based on the lack of contemporaneity of the data with the POR.

Petitioner asserts that based on record information, Razi's weighted average profit rate should be 145 percent. Petitioner notes that though this figure is high, that does not in itself indicate that Razi's home market sales were outside the ordinary course of trade. Petitioner notes that it is the

Department's practice to exclude sales with abnormally high profits only if there are unique and unusual characteristics related to the sales in question which make them unrepresentative of the home market. Petitioner claims that there is no evidence on the record that indicates that Razi's profits are unusually high. Petitioner cautions, however, that if the Department continues to use Fallah's data for the computation of the CV profit, the Department should use an average of all of the sales reported by Fallah in the New Shipper Review and not simply one single sale. In addition, citing to *Honey from Argentina: Final Results of Antidumping Duty Review*, 69 FR 30283 (May 27, 2004) and Final Results Analysis Memorandum for Honeymax, SAS U.S. sales program, line 1632 (May 20, 2004), petitioner and Cal Pure claim that the Department should apply the profit rate to the sum of all of the elements of constructed value, including Nima's general expenses.

Respondent did not comment on this issue.

Department's Position:

In computing CV for this proceeding, we find that the actual home market or third country profit experience of the specific exporter being examined does not exist because Nima did not sell the foreign like product in a foreign country. Because this precludes the Department from computing Nima's CV profit rate under section 773(e)(2)(A), we look to the three options under section 773(e)(2)(B). As the statute does not establish a hierarchy or preference amongst the three alternative methods in this part of the Act, in the instant proceeding, we have determined to calculate the respondent's CV profit under section 773(e)(2)(B)(iii) of the Act. This section states that the constructed value of imported merchandise shall include an amount realized for profits based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers in connection with the sale of merchandise that is in the same general category of products as the subject merchandise. We have on the record of this review the profit rate of the middleman from Nima's new shipper review, used in the preliminary results, and the profit information for the grower's home market sales during the POR. For these final results, we have applied the grower's profit to the grower's costs of production and the middleman's profit to the sum of Nima's indirect selling and packing expenses, the grower's costs, and profit at the grower level.

As to petitioner's argument that we must use all of the sales of the middleman to determine the middleman's profit, we disagree. The only sale at the middleman level on the record of this review is the one used in the preliminary results. We cannot use information not on the record of this review for purposes of determining CV profit.

The *SAA* notes that the Department may consider sales made at aberrational prices as being made outside the ordinary course of trade. *See Statement of Administrative Action* (*SAA*) accompanying the Uruguay Rounds Agreement Act (URAA), H. Doc. No. 316, 103d Cong., 2d Session at 839-840 (1994). While the profit made on home market sales by Razi is high by normal standards, it does not appear abnormal for a pistachio grower with a mature farm. Therefore, we have

computed an average profit for the POR at the grower level based on Razi's sales and cost data. As this profit rate reflects the actual profits earned by Razi, we have applied this rate to the grower's costs of production. *See* Final Results Cost Calculation Memo from Gina K. Lee through Michael P. Martin to Neal M. Halper, dated February 7, 2005. In addition, we have applied the middleman's profit rate from the new shipper review, which was used in the preliminary results, to the sum of the grower's COM, the grower's profit, and the exporter's indirect selling and packing expenses. Thus, we have included in CV an actual profit rate for the farmer as well as a profit rate for a reseller which, combined, reflect a total profit rate inclusive of both types of operations.

Comment 5: Application of Total Adverse Facts Available

Petitioner argues that Nima has failed to cooperate to its best ability in participating in this review. Specifically, petitioner claims that Nima has not complied with the Department's requests for the following information: 1) submission of the complete *IMA Report*;[4] 2) explanations of Nima's general accounting practices and specific expense items; 3) copies of Nima's accounting records; 4) revisions to Nima's reported costs; 5) explanations of changes made to Razi's reported cost of production figures; 6) relevant supporting data for the reported costs (*e.g.*, depreciation expenses); and 7) explanations regarding Razi's cost accounting system.

With regard to the *IMA Report*, petitioner contends that despite repeated requests from the Department, Razi did not provide the full *IMA Report*. Instead, petitioner claims that Razi continued to provide only the two page excerpt that it used to derive part of its reported costs. Petitioner argues that the Department would be relying on hearsay if it used the cost information, *i.e.*, the *IMA Report*, obtained from Razi's contact at the Iranian Ministry of Agriculture. Petitioner contests the Department's acceptance of this information if the Department does not give equal weight to the affidavit submitted by petitioner regarding Razi's knowledge of the ultimate destination of his sale of pistachios to Nima. Petitioner points to the countervailing duty (CVD) proceeding covering pistachios in which a more extensive version of the *IMA Report* was included on the record by petitioner. Petitioner claims that the complete report includes much more information than the excerpt submitted by respondent in this proceeding. Without the entire *IMA Report*, petitioner argues that the Department cannot corroborate the information provided by the contact at the Ministry of Agriculture nor can it reasonably conclude that the excerpt information truly represents a "national average cost" which can be used as an estimate for a portion of Razi's actual costs. As a result, petitioner claims that the Department cannot use any portion of the *IMA Report* to ascertain startup costs attributable to Razi.

In addition, petitioner argues that respondent has called into question its overall credibility through its late disclosure of the existence of Razi's cost ledger and the discrepancy in its reported labor

[4] A cost report prepared by the Iranian Ministry of Agriculture which reports on the Iranian pistachio industry.

cost figures. Petitioner asserts that Nima has failed to provide the Department with some of the most fundamental information needed to calculate actual dumping margins, despite being provided with repeated opportunities to correct its errors and omissions. As a result, petitioner insists that the Department should apply adverse facts available to Nima for these final results and as adverse facts available use the final dumping margin found in Nima's new shipper review.

Nima argues that it did not withhold any information from the Department, especially information relating to the *IMA Report*. Nima claims that it would have had no reason to hide the existence of the rest of the report if it had known of its existence. Nima notes that after reviewing the copy of the *IMA Report* from the record of a different proceeding, the additional information provided by petitioner does not change the information from the *IMA Report* reported by Nima.

Department's Position:

We disagree with petitioner that the application of total adverse facts available in this review is warranted. Section 776(b) of the Act provides that if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department, the Department may apply an adverse inference in selecting from the facts otherwise available. Here, we find that Nima did not fail to act to the best of its ability in responding to the Department's requests for information.

First, the Department recognizes in this case that Nima is a small company with an unsophisticated accounting and record keeping system. Moreover, the grower is a rural farmer operating in an environment that does not require the filing of tax returns or the preparation of financial statements. The evidence on the record of this proceeding indicates that Nima has cooperated fully with the Department and responded to requests for information to the best of its ability, in a timely manner, and in accordance with Department procedures and regulations.

Regarding petitioner's arguments with respect to Razi's cost of production, we recognize that Razi's reported costs changed significantly from its initial response to Section D of the Department's questionnaire to its last supplemental response (dated May 25, 2004). However, these changes occurred in response to the Department's numerous supplemental questions, which requested clarification of the entire section D response in preparation for the cost verification. At the cost verification, the Department reviewed and examined Razi's actual accounting ledgers and invoices, which supported the reported figures provided by Razi in its last supplemental section D questionnaire response. The Department noted some discrepancies in its cost verification report for certain expense items (*i.e.*, depreciation, pesticides, and electricity), and subsequently adjusted those expense items for the preliminary results. *See* Memorandum from Gina K. Lee to Neal M. Halper, Constructed Value Adjustments for Preliminary Results (July 30, 2004).

Contrary to petitioner's assertions that Nima failed to provide information to the Department

regarding its accounting and financial reporting, including the nature and per unit calculation of reported selling expenses, at verification, Nima described to the Department officials its normal accounting and financial reporting practices. *See* Sales Verification Report at 6. Nima did not provide its 2002-2003 Tax Return in its AQR to the Department, as it had not yet been filed with the Iranian Government. *See* Nima's SQR at 8. As noted by petitioner, Nima did submit for the record a copy of its filed tax return for fiscal year 2002 on May 25, 2004. Moreover, Nima indicated in its SQR at 9, that Nima's "profit and loss statement is reflected in Exhibit 1.1.a." (*i.e.*, income statement) but also that "{t}he official record of Nima does not reflect its balance sheet. However, all of Nima's accrued losses during March 21, 2002-March 21, 2003, in which it did not have any sales, could be considered as losses to shareholders, or their shareholder contribution to the start-up capital of the company." We note that Nima's response satisfies the Department's question as to whether or not Nima has an income statement or balance sheet for the March 21, 2002 - March 21, 2003 period. We also note that Nima confirmed that it had reported every relevant expense incurred by Nima and its owners, board members, and employees. *See* Nima's SQR at 10. On pages 14-15 of its SQR, Nima lists and describes all reported direct and indirect selling expenses, including expenses itemized in Exhibit 4F of its AQR. Because Nima provided an itemized listing of its indirect selling expenses, we were able to recalculate Nima's per unit indirect selling expense to reflect expenses associated with the total quantity of its U.S. sale only (*i.e.*, 100 kg.). As such, it was not necessary that Nima submit this recalculation to the Department.

Regarding petitioner's comments on Razi's unresponsiveness to our questions concerning Razi's cost accounting system, we note that Razi did not respond to those questions because it does not have a cost accounting system. We verified Razi's cost responses, which were filed within the statutory deadlines, and we were able to adjust the reported costs for the discrepancies noted in our cost verification report.

Further, with respect to the *IMA Report*, we have no reason to believe that the respondent withheld the full report from the Department. Razi explained on numerous instances that it tried to obtain the full report from the Iranian government. *See* Razi's supplemental section D questionnaire response, dated April 19, 2004, at 7. *See also* Razi's second supplemental section D questionnaire response, dated March 1, 2004, at 14. Moreover, we note that the version of the *IMA Report* referred to by petitioner was provided for the record of the CVD proceeding and is not part of the record of the instant review. Therefore, we do not find that there is basis for us to disregard either Razi's cost of production or Nima's U.S. sales data for purposes of these final results.

Comment 6: Ministerial Error Allegations Relating to the Calculation of Nima's Indirect Selling and Credit Expenses, and Foreign Unit Price in U.S. Dollars

Indirect Selling Expenses

Petitioner claims that the Department's revised preliminary methodology for calculating Nima's indirect selling expenses as outlined in its Prelim Correction Memo does not accurately reflect the actual expenses incurred by Nima. As such, petitioner argues that the Department should pursue its normal practice of calculating home market indirect selling expenses by summing Nima's reported total selling expenses (1,472,769 Rials) and the domestic warehousing expense (60,000 Rials) and dividing this sum by the quantity sold during the POR (100 kg.) to arrive at a per unit cost of 15,327.69 Rials.

Petitioner contends that the methodology proposed by the Department in its Prelim Correction Memo is complex and contains two major errors: 1) the denominator incorrectly includes Nima's total cost to purchase 154 kg. from its supplier valued at 4,342,800 Rials; and 2) the indirect selling expense factor calculated by the Department was incorrectly applied to Razi's per unit cost of production. In order to capture all the expenses directly related to the products that were sold by Nima, petitioner states that the Department should calculate Nima's total cost of goods sold as follows: 28,200 Rials (Nima's per unit purchase price) multiplied by the total quantity of subject merchandise Nima sold during the POR, *i.e.*, 100 kg. Petitioner claims that the Department erred in applying its indirect selling expense factor to Razi's per unit cost of production. Rather, petitioner states that the Department should apply the indirect selling expense factor to Razi's per unit sales price because it relates to selling expenses and not costs associated with the production of pistachios. However, petitioner notes that if the Department decides to apply the indirect selling expense factor to Razi's per unit cost of production, the indirect selling expense factor should be calculated as a percentage of Razi's total cost of production. Notwithstanding, petitioner contends that the Department should use Nima's per unit U.S. indirect selling expenses (*i.e.*, 15,327.69 Rials) as a proxy for selling expenses incurred by Nima had it sold pistachios in Iran.

Petitioner asserts that the case cited by the Department in its Prelim Correction Memo, which serves as the basis for its revised calculation of Nima's indirect selling expenses, differs factually from the instant case. *See Oil Country Tubular Goods from Argentina; Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 57215 (September 9, 2002) (*OCTG from Argentina*) (unchanged in final) and Memorandum to the File through Robert James, Program Manager, Analysis of Data Submitted by Acindar Industria Argentina de Aceros S.A. in the Preliminary Results, dated September 3, 2002 (public version). Specifically, petitioner states that *OCTG from Argentina* involved one entity only, whereas, the instant case involves a producer and an unrelated respondent/exporter. Thus, petitioner argues Nima's costs of goods sold and Razi's cost of production are not equivalent. According to petitioner, to correctly apply the calculation methodology from *OCTG from Argentina*, the Department should correct the errors described above.

Cal Pure claims that the Department's proposed methodology for calculating Nima's home-market indirect selling expenses (*i.e.*, (Nima's total indirect selling expenses/Nima's total cost of goods sold * Razi's per unit cost of production)) outlined in its Prelim Correction Memo is unnecessary and

incorrect.[5] Cal Pure asserts that this methodology is not necessary because the Department has on the record Nima's per unit indirect selling expenses. With respect to the Department's calculation of an indirect selling expense factor, Cal Pure explains that the Department incorrectly used one amount in the denominator (Nima's cost of sales), and then applied the resulting percentage to a different figure (Razi's cost of production), which is not a correct comparison. Cal Pure contends that Nima's cost of sales represent its cost to purchase the pistachios sold to AHON, which is equivalent to Razi's selling price and includes Razi's profit on its sale to Nima. Therefore, Nima's cost of goods sold (COGS) amount is higher than Razi's cost of production. Cal Pure claims the calculation outlined in the Prelim Correction Memo would result in incorporating into constructed value selling expenses that are less than Nima's actual selling expenses, permitting Nima to sell to the United States at a loss.

Moreover, Cal Pure contends that the Department erred when calculating Nima's cost of sales. Specifically, Cal Pure notes that the cost to purchase 154 kg. from Razi does not equal Nima's cost of goods sold, but rather, the cost to purchase the 154 kg. represents the cost of merchandise available for sale. Cal Pure explains the COGS is the cost of buying the products that were actually sold, *i.e.*, COGS is the value of beginning inventory plus purchases less the value of ending inventory. Cal Pure states that Nima purchased 154 kg., but sold only 100 kg., and it did not have any beginning inventory. Therefore, Cal Pure calculates Nima's cost of sales as 4,382,400 Rials (total cost of purchases) less the value of the remaining inventory, 1,522,800 Rials (unit price 28,200 times 54 kg.) which equals 2,820,000 Rials.

Cal Pure states the Department's reliance on *OCTG from Argentina*, as precedent for its calculation is incorrect because that calculation did not involve combining data for a separate producer and exporter, but rather involved a single company, the producer, Acindar. Thus, in that case, Cal Pure asserts that the Department could calculate an indirect selling expense ratio by dividing Acindar's selling expenses by its COGS and then multiply the result by the cost of manufacture (COM). Cal Pure states there is no distortion in this methodology because the ratio was applied to COM, which is consistent with the calculation of the underlying ratio. In order to correct the Department's proposed methodology, Cal Pure suggests that the Department calculate a ratio by dividing Nima's indirect selling expenses by Razi's total cost of production and then multiply the result by Razi's per unit cost of production. Nevertheless, Cal Pure asserts that the Department should use Nima's per unit indirect selling expense in its final calculation of constructed value.

Petitioner further claims that Nima's reported indirect selling expenses are based only on costs it incurred during the last three months of the POR; and therefore, Nima did not include in its total expenses it incurred during the first nine months of the POR.

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[5] Cal Pure states that in its *Preliminary Results* the Department erroneously calculated indirect selling expenses as the sum of the per unit indirect selling expenses (warehousing and selling) divided by gross unit price. However, Cal Pure alleges that these expenses were already expressed as per unit amounts and, no division was required, which would understate the actual amount.

Specifically, according to Nima's 2002-2003 tax return, petitioner notes that Nima incurred a total of 17,250,000 Rials in administrative expenses during the period March 2002 to March 2003. Petitioner states that this figure reconciles to the expenses reported on Nima's internal financial statement covering the period March 21, 2002 to March 21, 2003 and that of these expenses, 16,483,132 Rials (including 104,132 Rials for expenses covering the first 21 days of the current POR) were incurred during the POR of the current proceeding. *See* petitioner's case brief at Attachment 3. Consistent with Department practice, petitioner contends that the 16,483,132 Rials should be added to Nima's reported indirect selling expenses.

Furthermore, petitioner and Cal Pure contend that the sum of the expenses identified on Nima's internal financial statement for the period March 21, 2003, to June 30, 2003 (*i.e.*, 10,029,308 Rials) does not reconcile to the total expenses line item (*i.e.*, 10,048,328 Rials). *See* Sales Verification Exhibit 3. Accordingly, petitioner and Cal Pure assert that the resulting difference of 19,020 Rials should also be added to Nima's selling expense total. *See* petitioner's case brief at Attachment 4 for its calculation of the unreconciled difference between the expenses reported in Nima's questionnaire responses and those reported in its internal financial statement. *See also* Cal Pure's case brief dated September 16, 2004, at Exhibits A and B.

In rebuttal, Nima states that its expenses are accurately reflected in the Department's Prelim Correction Memo. Nima explains that out of 17,250,000 Rials of total expenses, 16,180,000 Rials were exclusively the cost of air tickets to Dubai solely for purposes of verification for the new shipper review.

In response to Nima's rebuttal comments, Cal Pure claims that Nima's argument is not supported by the record or Department practice. Cal Pure reiterates that the Department should make the changes discussed in its case brief to its preliminary findings for these final results.

Credit Expenses

With respect to Nima's reported credit expenses, petitioner and Cal Pure assert that the Department should adjust the credit period from 35 days to 37 days in its calculation of Nima's imputed credit expense. Nima reported a payment date of June 24, 2003, which reflects the date on which AHON issued the check to Nima. In it SQR, Nima acknowledged that the correct payment date is June 26, 2003, which is the date Nima's representative received the check from AHON. *See* Nima's SQR at 11. Thus, petitioner and Cal Pure argue that the Department should use the June 26, 2003, payment date in calculating Nima's credit period for the sale under review.

Foreign Unit Price in U.S. Dollars

Petitioner and Cal Pure claim that the Department erred in its calculation of Nima's foreign unit

price in U.S. dollars (FUPDOL). Petitioner and Cal Pure state that the Department's calculation worksheet issued with its preliminary results correctly describes the calculation of constructed value as: FUPDOL = CV + COMMISU + DIREXPU + OFFSETU – OFFSETH. However, petitioner and Cal Pure contend that the formula contained in the cell that defines the calculation of constructed value indicates that Nima's direct selling expenses are deducted, rather than added, to constructed value, *i.e.*, FUPDOL = CV + COMMISU – DIREXPU + OFFSETU – OFFSETH. Thus, petitioner and Cal Pure assert that the Department should ensure that the variable DIREXPU is added to constructed value in its final margin calculation.

Department's Position:

We agree with petitioner and Cal Pure, in part. In reviewing our proposed calculation of Nima's indirect selling expenses outlined in our Prelim Correction Memo, we find that it is inappropriate to apply a ratio based on the selling expenses and cost of goods sold of one entity to the per unit cost of production of a separate entity. Therefore, we calculated Nima's indirect selling expenses based on its reported per unit U.S. indirect selling expenses, less amounts for expenses specific to export activities that would not have been incurred by Nima on home market sales of pistachios. *See* Final Analysis Memo at Attachments 1 and 2.

We have not included in Nima's indirect selling expense calculation expenses associated with the verification of Nima's new shipper review. We find that these expenses (*i.e.*, 16,380,000 Rials) represent unusual and extraordinary costs, which would not be incurred by Nima in the ordinary course of business. *See* Nima's SSQR at 5. Moreover, we have not included the expenses claimed by petitioner and Cal Pure to have been incurred by Nima in the first month of the POR (*i.e.*, 104,132 Rials). Like the expense noted above and the other expenses reflected on Nima's 2002/2003 internal financial statement, we believe that these expenses are related to Nima's participation in a prior proceeding, *i.e.*, its new shipper review. We do not find it appropriate, therefore, to include these expenses in the indirect selling expense calculation for this POR.

In addition, we have not included in Nima's indirect selling expense calculation expenses totaling 19,020 Rials that petitioner and Cal Pure allege Nima incurred during the POR but failed to report the Department. We note that neither petitioner nor Cal Pure provide evidence to substantiate their claims that Nima incurred these expenses during the POR. In reviewing Nima's internal financial statement, it appears that Nima simply erred in its summation of its total expenses and inadvertently overstated the total figure by 19,020 Rials. At verification, Department officials were able to reconcile the expenses reported by Nima to its internal financial statement, and we have included each expense, as appropriate, in Nima's indirect selling expense calculation for these final results. *See* Final Analysis Memo at Attachments 1 and 2.

In addition, we have adjusted Nima's reported U.S. credit expenses to reflect a credit period of 37 days, instead of 35 days. We also added Nima's adjusted imputed credit expenses to the sum of Nima's U.S. direct selling expenses (field DIREXPU), which is included in our calculation of FUPDOL. *See* Final Analysis Memo at Attachment 1. With regard to our calculation of Nima's FUPDOL, we have corrected the underlying program language to add, rather than subtract, Nima's total U.S. direct selling expenses in our calculation of FUPDOL. *See* Final Analysis Memo at Attachment 1.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final antidumping margin and the final results of this administrative review in the *Federal Register*.

_____ _____

Agree Disagree

_____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____

Date